BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE   CASE NO. SC10-348

RE: JUDGE DALE C. COHEN

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JQC'S OPPOSITION TO MOTION TO DISMISS NOTICE OF FORMAL CHARGES

The Florida Judicial Qualification Commission, by its undersigned
counsel, files this response to Judge Cohen's motion to dismiss notice of
formal charges.

INTRODUCTION

Judge Cohen's motion to dismiss is 17 pages long, and purports to
respond to 13 separate "counts" in the notice of formal charges. But the
notice of formal charges does not contain 13 separate counts. The notice of
formal charges is in the form of a single "count" that alleges a pattern of
misconduct involving several events over a period of time. *In Re Crowell*,
379 So.2d 107, 110 (Fla. 1979) ("Conduct unbecoming a member of the
judiciary may … be proved by evidence of an accumulation of small and
ostensibly innocuous incidents which, (taken) together, emerge as a pattern
of hostile conduct unbecoming a member of the judiciary." Quoting from *In*

Re Kelly, 238 So.2d 565, 566 (Fla. 1970)) We hasten to add that the events alleged against Judge Cohen in the notice of formal charges are far from innocuous and plead a clear case of ongoing abuse of judicial power for personal gain.

Judge Cohen argues, without citation of authority, that none of the individual paragraphs in the notice of formal charges refers to any specific Canon violated "as is required by the Rules." One will search the Florida Judicial Qualifications Commission Rules, the Rules of Civil Procedure and Florida case law in vain for any requirement that each paragraph of a notice of formal charges must refer to a specific Canon. That requirement simply does not exist.

Judge Cohen also argues that the notice of formal charges is "more closely analogous to a criminal information," but he again fails to cite any rule of the JQC, any rule of Civil Procedure, or any case law to support this proposition. The law is actually to the contrary. *In Re Kelly*, 238 So.2d 565, 569 (Fla. 1970) ("The proceeding before the Commission lacks the essential characteristics of a criminal prosecution. The object is not to inflict punishment, but to determine whether one who exercises judicial power is unfit to hold the judgeship.")

The JQC's own rules and the Rules of Civil Procedure apply to this proceeding (Commission Rule 12(a)), and the only difference between a JQC proceeding and a run-of-the-mill civil action is that the JQC standard of proof is "clear and convincing" rather than "the greater weight of the evidence." *In Re Graziano*, 696 So.2d 2d 744, 753 (Fla. 1997). This is a civil and not a criminal proceeding.

FACTS AND VIOLATIONS ALLEGED

The only JQC rule pleading requirement is found in Rule 6(g), which provides that the notice:

> shall … specify in ordinary and concise language the charges against the judge and allege the essential facts upon which charges are based, ….

In ordinary and concise language, the notice of formal charges notifies Judge Cohen of the following "essential facts:"

- Attorney Steve Melnick was involved in a lawsuit against Judge Cohen's wife involving her candidacy for judicial office, and Mr. Melnick filed a legally-sufficient, sworn motion to recuse Judge Cohen from a criminal case.

- Contrary to the Rules of Judicial Administration, Judge Cohen held an evidentiary hearing, met with his own wife ex parte before the hearing, called his wife as a witness, interrogated her at the hearing,

and put Mr. Melnick in a position of attacking Judge Cohen's wife's credibility. Judge Cohen admitted to the Commission that his conduct violated the Judicial Canons.

- Judge Cohen's purpose was to intimidate Mr. Melnick and to use the power of his office to advance his and his wife's interests, which was an abuse of judicial power.

- Twenty-two days after that hearing, Mr. Melnick filed a motion to recuse in another criminal case before Judge Cohen.

- In the second case, Judge Cohen swore in the criminal defendant, and began questioning him, over Mr. Melnick's objection, about the defendant's conversations with his attorney, Mr. Melnick.

- Judge Cohen's purpose was to embarrass and intimidate Mr. Melnick and to use his judicial power to advance his personal interests and those of his wife, which was an abuse of judicial power.

- One of Mr. Melnick's clients came before Judge Cohen for sentencing because Mr. Melnick was no longer representing him, Judge Cohen questioned the defendant about the motion to disqualify to develop information to embarrass Mr. Melnick.

- In his initial personal appearance before the Investigative Panel, Judge Cohen described Mr. Melnick as a friend for whom he had no

animosity, but in his second, written appearance before the Investigative Panel, Judge Cohen sought to discredit Mr. Melnick by personal attacks, and submitted photographs of Mr. Melnick that Judge Cohen's wife clandestinely took in a Broward County courtroom. The purpose was to embarrass and intimidate Mr. Melnick and to advance Judge Cohen's personal interests and those of his wife.

- During Judge Cohen's initial personal appearance before the Investigate Panel, he failed to disclose his holding of an evidentiary hearing in the *Butler* case, which was relevant to the Commission's attempt to ascertain the purpose of Judge Cohen's conducting a hearing in the *Gibbs* case.

- Judge Cohen engaged in a continuing pattern of judicial misconduct constituting a pattern and practice unbecoming a judicial officer and lacking the dignity appropriate to the judicial office, with the effect of bringing the judiciary into disrepute.

As to the specific Judicial Canons violated, the notice of formal charges alleges both in the introductory paragraph and in paragraph 12 of the notice that Judge Cohen's acts violate "the Preamble to and Canons 1A, 2A,

2B, 3B(1), 3B(2), 3B(7) and 3E(1)(d) of the Code of Judicial Conduct."
Those provisions state:

- PREAMBLE: "Whether discipline is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system."

- 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

- 2B: "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; …"

- 3B(1): "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required."

- 3B(2): "A judge shall be faithful to the law and maintain professional competence in it."

- 3B(7): "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding …."

- 3E(1)(d): "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: ….

                          *   *   *

(d) The judge or the judge's spouse, … (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge likely to be a   material witness in the proceeding; …."

Accordingly, the notice of formal charges places Judge Cohen on fair notice regarding the foregoing "essential facts," JQC Rule 6(g)(2), and that those facts violate the foregoing specific Judicial Canons.

Paragraph 12 of the notice of formal charges asserts that Judge Cohen has engaged in a "continuing pattern of judicial misconduct" which "constitutes a pattern and practice unbecoming a judicial officer and lacking the dignity appropriate to judicial office, with the effect of bringing the judiciary into disrepute." Accordingly, the premise of the notice of formal

charges is that the facts alleged are interconnected and constitute an ongoing pattern and practice of misconduct. Judge Cohen is on fair notice regarding what he did and the specific Judicial Canons violated.

ARGUMENT

In addition to JQC Rule 6(g)'s requirement that the notice of formal charges use "ordinary and concise language" that alleges "the essential facts upon which the charges are based," Fla.R.Civ.P. 1.110(b), says that a complaint must contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." The notice of formal charges, which is 13 paragraphs and barely over six pages long, uses "ordinary and concise language," alleges the "essential facts," and is a "short and plain statement" of "ultimate facts." It meets the test of each rule.

Judge Cohen also bases his motion to dismiss on Rule 1.110(f), Fla.R.Civ.P., which provides that "each claim founded upon a separate transaction or occurrence … shall be stated in a separate count . . . when a separation facilitates the clear presentation of the matter set forth." First, the motion to dismiss is not the proper procedural vehicle for a Rule 1.110(f) motion. It is settled law that only a "motion to compel separate statements of claim," will afford relief under Rule 1.110(f). *Sikes v. Seaboard Coast Line R. Co.,* 429 So.2d 1216 (Fla. 1st DCA 1983). Furthermore, a motion to

dismiss a complaint for failure to state a cause of action is an improper way to deal with claims of vague and ambiguous pleading. *Fountainebleau Hotel Corp. v. Walters*, 246 So.2d 563, 565 (Fla. 1971).

Judge Cohen's assertion (his Motion to Dismiss at p. 6) that the "mere support of an opponent of a trial judge in an election" is insufficient to support a motion for disqualification is beside the point. In the notice of formal charges, the JQC alleges not merely that Mr. Melnick was supporting an opponent of Judge Cohen's wife, but that Mr. Melnick was actively involved in a lawsuit against Judge Cohen's wife to have her removed from the ballot, and that the lawsuit also contained allegations about Judge Cohen's personal involvement in the election re-count for his wife. That is considerably more than the mere support of the opponent of Judge Cohen's wife in the judicial election, and provides ample grounds for recusal.

CONCLUSION

A motion to dismiss is not the proper vehicle to compel the JQC either to plead its notice of formal charges in separate counts or to replead to correct claims of vague and ambiguous pleading. There is no rule, statute or case authority for Judge Cohen's argument that each paragraph of the notice of formal charges must cite a specific Canon or that a notice of formal charges is similar to a criminal information. Judge Cohen is on fair notice of

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the claim against him. For all of these reasons, Judge Cohen's motion to dismiss must be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to: Michael A. Catalano, Esq., Michael A. Catalano, P.A., 1531 N.W. 13th Court, Miami, FL 33125 and Laurie Waldman Ross, Esq., Ross and Girten, 9130 S. Dadeland Blvd., Suite 1612, Miami, FL 331256 this ___ day of April, 2010.

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